A

WONG YEW KWAN

v.

WONG YU KE & ANOR

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-02-683-2006]

C

24 DECEMBER 2008

LAND LAW: *Title - Indefeasibility of title - Allegation of fraud - Whether sufficient to raise allegation - Whether specific particulars must be pleaded - Whether action to attack registered owner's title must be*

D

initiated - National Land Code 1965, s. 340(1)

LAND LAW: *Title - Equitable title - Promise to transfer land - Whether promise must be made by registered owner - Whether in personam claim*

CIVIL PROCEDURE: *Locus standi - Application for recovery of land*

E

- Application brought by some part owners - Whether all owners must be parties to action - Whether other owners' consent sufficient - Whether objection to locus standi could be raised in affidavit opposing striking out application - Rules of the High Court 1980, O. 18 r. 19

F

CIVIL PROCEDURE: *Striking out - Delay - Application to strike out defence and counterclaim - Whether delay of 14 months fatal - Rules of the High Court 1980, O. 18 r. 19*

CIVIL PROCEDURE: *Declaration - Application for - Trespass -*

G

Application for declaratory order that defendant was a trespasser - Whether in contravention of Specific Relief Act - Specific Relief Act 1950, s. 41

CIVIL PROCEDURE: *Judgment - Final judgment - Striking out proceedings - Whether judge can give final judgment at striking out*

H

application - Rules of the High Court 1980

CIVIL PROCEDURE: *Pleadings - Fraud - Whether must be specifically pleaded - Whether pleading recent discovery and on-going investigations sufficient - Whether non-particularisation of fraud was fatal*

I

- Rules of the High Court 1980, O. 18 r. 8 (1)

The appellant ('defendant') and respondents ('plaintiffs') are brothers. The plaintiffs are registered part owners of land including a four-storey building, which was transferred to them by their father and mother. The defendant had been in occupation of the ground floor of the building since 1 April 1971, carrying on the business which he and their father had established as partners and was still carrying on business there under the same name. The plaintiffs demanded delivery of vacant possession on 31 July 2004. The defendant refused to deliver vacant possession. The plaintiffs filed an action for recovery on the grounds that the plaintiffs had terminated the defendant's license to occupy and also sought a declaratory order that the defendant was a trespasser.

The defendant in his defence and counterclaim alleged that: (i) he had an irrevocable licence coupled with equity and claimed the right to be registered as a co-owner with 1/4 share; and (ii) the transfer to the plaintiffs by their father and mother was by way of fraud. The defendant alleged that he had contributed towards the purchase price of the property and that his father had promised to transfer the land to him. The defendant also alleged having incurred costs in renovating the premises and therefore had an irrevocable license coupled with interest to remain in occupation of the land. The defendant argued that the issue whether he holds an irrevocable license coupled with interest could only be determined at trial by way of oral testimony of witnesses.

The plaintiffs applied to strike out the defendant's defence and counter-claim under O. 18 r. 19 of the Rules of the High Court 1980 ('RHC'). At the hearing of the striking out application the defendant raised the following preliminary objections: (i) the plaintiffs had no *locus standi* to commence proceedings as the other co-owners of the land had not been cited as plaintiffs; (ii) the delay in filing the striking out application 14 months after the close of pleadings; and (iii) the declaratory order sought by the plaintiffs contravened s. 41 of the Specific Relief Act 1950 ('SRA'). All the objections were all dismissed by the High Court judge as being devoid of merit. She also allowed the striking out application on the grounds that no particulars of the alleged fraud were pleaded in the defence or counterclaim.

The defendant has appealed. The defendant argued, *inter alia*, that the application to strike out a defence and counter-claim and to enter judgment could not be made in one and the same

A application as different considerations applied and the application should have been dismissed as it sought two separate and distinct mutually exclusive reliefs.

Held (dismissing the appeal with costs)

B **Per Gopal Sri Ram JCA:**

(1) Section 340(1) of the National Land Code immunises the title of a registered proprietor from impeachment save where registration is occasioned by the exceptions in s. 340(2), namely fraud, forgery or insufficient or void instrument. The C defendant sought to rely on the fraud exception by mere general allegations, but made no attack against the plaintiffs' title. As the plaintiffs are the registered proprietors of the land, they are entitled to vacant possession. *Teh Bee v. Maruthamuthu* (foll). (paras 4 & 6)

D

(2) At best, the defendant seeks to fasten upon the plaintiffs' conscience a promise made by their mother by alleging an *in personam* claim. However for equity to act *in personam*, it is necessary that the charge of unconscionability must be E directed at something the plaintiffs had done or promised to do. That is not the defendant's case and the facts relied on fall far short of any inequitable or unconscionable conduct on the respondents' part. The defendant's pleadings were clearly demurrable and were rightly struck out by the learned judge. F (paras 7 & 9)

Per Zaleha Zahari JCA:

(1) The judge correctly ruled that the issue of *locus standi* should have been raised in the defence and not by way of an affidavit G in opposition to the striking out application and it was not open for the defendant to improve his defence by way of an affidavit. The judge also held that it was a non-issue as the other registered co-owners of the land had given their consent to the plaintiffs to commence proceedings against the H defendant, and that it was unnecessary for the other co-owners to be joined as parties as it would increase costs. In any event no cause or matter should be defeated by reason of non-joinder of any party. (para 19)

I **(2)** The judge was correct in ruling that the issue of delay in bringing the striking out application was devoid of merit as an application under O. 18 r. 19(1) of the RHC could be made at any stage of the proceedings. (para 20)

(3) The judge was also correct in ruling that there was nothing in s. 41 of the SRA to prohibit a court from exercising its discretion to make a declaratory order as long as the order sought was for a purpose and not at the instance of a busy body. The court's jurisdiction to make declaratory order was only subject to its own discretion and the plaintiffs, as the registered owners of the land, clearly had an interest in the property. (para 21)

(4) It is trite law that a court can enter judgment after striking out the defence. As the judge found that the defendant's statement of defence and counterclaim did not disclose a reasonable defence nor a reasonable cause of action, it was a plain and obvious case for the court to exercise its power to strike out the defence and counterclaim, as well as for final judgment to be entered against the defendant. (para 23)

(5) Order 18 r. 7(1) of the RHC requires a party to state material facts necessary for his defence and counterclaim. On the issue of fraud, O. 18 r. 8(1) requires fraud to be specifically pleaded so as not to take the other party by surprise. The defendant's admission that the discovery of fraud was recent and that investigations were still on-going was insufficient and the non-particularisation of the allegation of fraud was fatal. (paras 24 & 25)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('defendan') dan responden ('plaintif-plaintif') adalah adik-beradik. Plaintif-plaintif adalah pemilik berdaftar sambilan hartanah termasuk bangunan empat tingkat, yang dipindahkan ke plaintif-plaintif oleh ibu bapa mereka. Defendan telah menduduki tingkat bawah rumah bangunan tersebut sejak 1 April 1971, mengendalikan perniagaan yang telah ditubuhkan dengan bapanya sebagai rakan perniagaan dan masih mengendalikan perniagaan tersebut di bawah nama yang sama. Plaintif-plaintif menuntut penyerahan milikan kosong pada 31 Julai 2004. Defendan enggan menyerahkan milikan kosong. Plaintif-plaintif memfailkan tindakan mendapat kembali atas alasan-alasan bahawa plaintif-plaintif telah membatalkan lesen defendan untuk menduduki kawasan tersebut dan memohon sebuah perintah perisytiharan bahawa defendan adalah seorang penceroboh.

A Defendan, dalam pembelaannya dan tuntutbalasnya, berhujah bahawa; (i) defendan mempunyai lesen yang tidak boleh dibatal bersama dengan ekuiti dan menuntut hak untuk didaftar sebagai pemilik bersama dengan 1/4 kongsian; dan (ii) pemindahan kepada plaintif-plaintif oleh ibu bapa mereka adalah melalui fraud. B Defendan berhujah yang beliau telah menyumbang kepada harga belian hartanah dan bapanya telah membuat perjanjian untuk memindah hartanah tersebut kepada defendan. Defendan juga berhujah telah mengalami kos dalam membuat renovasi ke atas hartanah tersebut dan oleh itu mempunyai lesen yang tidak boleh C dibatalkan dan mempunyai hak untuk kekal menduduki hartanah. Defendan berhujah bahawa isu sama ada defendan memegang lesen yang tidak boleh dibatal bersama dengan haknya hanya boleh diputuskan melalui perbicaraan dengan testimoni saksi-saksi.

D Plaintif-plaintif memohon untuk membatalkan pembelaan dan tuntutbalas defendan di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Di pendengaran kes permohonan pembatalan kes, defendan mengutarakan bantahan-bantahan awal: (i) plaintif-plaintif tidak mempunyai *locus standi* untuk memulakan E prosiding kerana pemilik-pemilik bersama hartanah yang lain tidak dinamakan sebagai plaintif-plaintif; (ii) kelewatan memfailkan permohonan pembatalan 14 bulan selepas penutupan prosiding; and (iii) perintah pengisytiharan yang dituntut oleh plaintif-plaintif telah melanggar arahan s. 41 Akta Relief Spesifik 1950 ('ARS'). F Segala bantahan-bantahan telah ditolak oleh hakim Mahkamah Tinggi kerana tidak bermerit. Hakim tersebut juga membenarkan permohonan pembatalan atas alasan bahawa tiada butiran-butiran tuduhan fraud ditimbulkan di dalam pembelaan atau tuntutbalas.

G Defendan merayu. Defendan berhujah, *inter alia*, bahawa permohonan untuk membatalkan pembelaan dan tuntutbalas dan untuk memasukkan penghakiman tidak boleh dibuat dalam satu permohonan kerana terdapat pemakaian pertimbangan yang berbeza dan permohonan sepatutnya ditolak kerana ia menuntut dua relif eksklusif yang berlainan dan berbeza.

H

Diputuskan (menolak rayuan dengan kos)
Oleh Gopal Sri Ram HMR:

(1) Seksyen 340(1) Kanun Tanah Negara mengimunkan hakmilik I seorang pemilik berdaftar daripada pencabaran kecuali di mana pendaftaran dilakukan oleh pengecualian-pengecualian di bawah s. 340(2), iaitu fraud, pemalsuan atau satu instrumen yang

tidak memadai atau tak sah. Defendan membuat rujukan atas pengecualian fraud dengan memberi dakwaan-dakwaan sahaja, tetapi tidak menyerang hak plainti-plaintif. Plaintif-plaintif adalah pemilik berdaftar tanah, mereka mempunyai hak diberi milikan kosong. (*Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7 (diikuti))

(2) Paling bagus pun, defendan berpegang pada nurani plaintif-plaintif perjanjian yang telah dibuat oleh ibu mereka dengan menyatakan permohonan *in personam*. Walaubagaimanapun, untuk ekuiti dilakukan *in personam*, ia adalah perlu untuk tuduhan tidak berpatutan mestilah ditujukan kepada sesuatu yang telah diperbuat atau dijanjikan oleh plaintiff-plaintfiff. Itu bukanlah kes defendan dan fakta-fakta yang dirujuk tidak cukup untuk membuktikan perlakuan tidak berekuiti atau tidak berpatutan oleh responden. Pliding-pliding defendan boleh dibantah dan hakim bicara tidak salah apabila membatalkannya.

Oleh Zaleha Zahari HMR:

(1) Hakim membuat keputusan yang betul apabila memutuskan isu *locus standi* sepatutnya dibangkitkan di dalam pembelaannya dan tidak melalui afidavit menentang permohonan pembatalan dan ia tidak terbuka kepada defendan untuk memperbetulkan pembelaannya melalui afidavit. Hakim juga memutuskan ia bukan merupakan satu isu kerana pemilik-pemilik berdaftar yang lain telah memberi kebenaran kepada plaintif-plaintif untuk memulakan prosiding-prosiding terhadap defendan, dan ia tidak perlu untuk pemilik-pemilik yang lain untuk dijadikan pihak-pihak yang terlibat kerana ia akan menambahkan kos. Walau apa pun, tiada kausa atau halperkara patut ditewaskan atas alasan pihak-pihak tertentu gagal dicantumkan.

(2) Hakim membuat keputusan yang betul apabila membuat keputusan bahawa isu kelewatan membawa permohonan pembatalan tidak mempunyai merit kerana permohonan di bawah A. 18 k. 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 boleh dibuat pada mana-mana tahap prosiding.

(3) Hakim membuat keputusan yang betul apabila memutuskan bahawa tidak terdapat dalam s. 41 Akta Relief Spesifik 1950 untuk menghalang mahkamah daripada melaksanakan budibicaranya untuk membuat perintah deklarasi selagi perintah yang dipohon adalah bertujuan dan bukan atas orang yang hanya menyibuk. Bidangkuasa mahkamah untuk membuat perintah perisytiharan hanya tertakluk kepada budibicaranya

A sendiri dan plaintif-plaintif, sebagai pemilik-pemilik berdaftar hartanah tersebut, dengan jelasnya mempunyai hak atas hartanah tersebut.

(4) Adalah menjadi undang-undang lazim bahawa mahkamah boleh
B mencatat penghakiman selepas membatalkan pembelaan. Hakim mendapati bahawa pernyataan pembelaan dan tuntutan balas tidak membuat pendedahan pembelaan yang munasabah ataupun kausa tindakan yang munasabah, ia jelas menunjukkan kes untuk mahkamah melaksanakan kuasa membatalkan
C pembelaan dan tuntutbalas, termasuk penghakiman muktamad untuk penghakiman terus dicatatkan terhadap defendan.

(5) Akta 18 k. 7(1) Kaedah-kaedah Mahkamah Tinggi 1980 memerlukan pihak yang terlibat untuk menyatakan fakta-fakta material yang penting untuk pembelaan dan tuntutbalasnya.
D Atas isu fraud, A. 18 k. 8(1) memerlukan fraud diplidkan secara khusus supaya tidak memberi kejutan ke pihak yang lain. Pengakuan defendan bahawa penemuan fraud adalah baru dan penyiasatan masih berterusan adalah tidak memadai dan
E kegagalan memberi fakta-fakta atas tuduhan fraud adalah fatal.

[Perintah sekadarnya.]

Case(s) referred to:

Associated Leisure Ltd & Ors v. Associated Newspapers Ltd [1970] 2 QB 450 ***(refd)***
F
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bannister v. Bannister [1948] 2 All ER 133 ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

G *Lee Yoke San v. Tong Lee Hwan & Anor [1977] 1 LNS 58 HC* ***(refd)***

Maine and New Brunswick Electrical Power Co v. Hart AIR [1929] PC 185 ***(refd)***

Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor [1975] 1 LNS 178 FC ***(refd)***

H *Teh Bee v. K Maruthamuthu [1977] 1 LNS 134 FC* ***(foll)***

Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***

Legislation referred to:

Distribution Act 1958, s. 6(1)(e)

Law of Property Act 1925, s. 53(1)(b)

I National Land Code, s. 340(1), (2)

Rules of High Court 1980, O. 18 rr. 7(1), 8(1), 19(1)(b), (d)

Specific Relief Act 1950, s. 41

Law of Property Act 1925 [UK], 53(1)(b)

For the appellant - Dato' Manpal Singh (Adrian Oswald with him); M/s Manjit Singh Sachdev, Mohamad Radzi & Partners
For the respondents - John Clark (Alvin Lai with him); M/s Sidek Teoh Wong & Dennis

[Editor's note: For the High Court judgment, please see Wong Yu Ke v. Wong Yew Kwan [2006] 7 CLJ 288.]

[Appeal from High Court; Kuala Lumpur; Civil Suit No: S4-22-1352-2004]

Reported by Anne Khoo

JUDGMENT

Gopal Sri Ram JCA:

[1] The appellant before us (defendant in the court below) had his defence and counterclaim struck out. He complains that his is an arguable case and hence he ought not to have been driven away from the judgment seat.

[2] The relevant facts have been admirably summarised by the learned judge and I gratefully quote from her:

> The plaintiffs and defendant are brothers. The plaintiffs are registered co-owners of the land which was transferred to them by their father Wong Hong. The land includes a 4 storey building, where their father used to occupy the ground floor. The defendant was invited to join the father then doing business under the style and name Hong Kee Trading. The defendant has remained in occupation of the said land till now. The plaintiffs being registered owners have demanded delivery of vacant possession by a letter dated 31 July 2004. The defendant refused to deliver vacant possession and hence the plaintiffs filed this legal action.

[3] She went on to accurately summarise the case before her as follows:

> [12] The thrust of the plaintiffs' application was based on the fact that the plaintiffs are both registered co-owners whilst the defendant has been in occupation of the property originally as licensee which has been terminated by the plaintiffs.
>
> [13] Premised on the Torrens system concept of indefeasibility of title the right of the defendant if any would be the exception to s. 340(2) of the National Land Code 1965. As provided

in that section registered title can only be defeated on grounds of fraud, misrepresentation, forgery or by authority of law.

[14] The defendant in the statement of defence raised the defences of; fraud, a promise by his mother to give a portion of the property due to some payment made by him as directed by the parent, that he is a licensee coupled with equity and having an irrevocable licence. Pursuant to that defence the defendant in his prayer in the counterclaim claims to own 1/4 of the land, and that he be registered as a co-owner with 1/4 share.

[15] The defendant alleged that the transfer to the plaintiffs by their father was by way of fraud, but no particulars were pleaded in the statement of defence or the counterclaim, it is trite law that particulars of fraud must not only be pleaded, but must be specifically pleaded. In the High Court case of *Malayan Banking Berhad v. Lim Tee Yong* [1994] 4 CLJ 558 it was held by the High Court that it is established law that the expression fraud cannot be generally or vaguely pleaded. In *Lee Kim Luang v. Lee Shiah Yee* [1988] 1 CLJ 619; [1988] 1 CLJ (Rep) 717 the High Court held that a general allegation of fraud is insufficient event to amount to averment of fraud. There is good reason why fraud must be specifically pleaded and required in O. 18 r. 8(1) of the RHC. It is not to take the other party by surprise. In fact L. Dening MR in *Associated Leisure Ltd. & Ors v. Associated Newspapers Ltd* [1970] 2 QB 450 said that 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it'.

[16] In his submission Mr. Lee suggested that though particulars of fraud are not specified, it can be done later by way of amendment. This is because the defendant is still in the process of investigating the matter. That being the case, it is clear that the plea of fraud in the statement of defence as well as in the counterclaim of the defendant is a mere speculation. As such, it is even clearer that the defendant has no defence but hoping to find something to establish fraud. In any event, fraud or forgery is not a matter barred by statute of limitation the defendant can take his time with his investigation. However, it would not be fair for the plaintiffs to be made to wait for the completion of the investigation by the defendant before they can exercise their rights and benefits as registered land owners.

> [17] Besides the general allegation of fraud the defendant raised issues of payment that had been allegedly made as directed by their mother resulting in a promise of 1/4 shares to the defendant. At the same time the defendant admitted that the property was transferred to the plaintiffs by their father. The defendant also alleged that the transfer was done without the knowledge of the defendant. The defendant further alleged that the transfer to the plaintiffs was done under mysterious situation. All these defences pleaded are not defences that can create exception to the title of the plaintiffs under s. 340 of the NLC. As such I do not see the need to dwell further into any of them.

[4] In my judgment the learned judge was entirely correct in striking out the appellant's pleading as being plainly and obviously unsustainable. Both principle and authority favour her decision. First the principle. It is to be found in s. 340(1) of the National Land Code to which she adverted in her judgment. That section immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s. (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument. In the present case, the appellants sought to rely on the fraud exception. But, as correctly pointed out by the learned judge, mere general allegations of fraud are insufficient to constitute a pleaded case of fraud. As Lord Hatherley said in *Wallingford v. Mutual Society* [1880] 5 App Cas 685:

> There is the question of fraud upon which I said I should touch in one moment. Now I take it to be as settled as anything well can be by repeated decisions, that the mere averment of fraud, in general terms, is not sufficient for any practical purpose in the defence of a suit. Fraud may be alleged in the largest and most sweeping terms imaginable. What you have to do is, if it be matter of account, to point out a specific error, and bring evidence of that error, and establish it by that evidence. Nobody can be expected to meet a case, and still less to dispose of a case, summarily upon mere allegations of fraud without any definite character being given to those charges by stating the facts upon which they rest.

[5] As for authority, I need go no further than *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134 FC, which supports the proposition that even if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register. In that case, the

A defendant was in occupation of certain land of which the plaintiff was the registered proprietor. He had been there for a very long time - since 1952. He occupied it by virtue of a temporary occupation licence which had been issued to him by the appropriate authority. The plaintiff had obtained registration of her
B title in breach of the express provisions of the Code which the State Authority had failed to observe. The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. He said that the State
C Authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State Authority claiming a declaration of invalidity and
D consequential orders. There was simply no frontal attack on the plaintiff's title. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed.

E **[6]** So too here. The plaintiffs (respondents before us) are the registered proprietors of the land in question. There is no frontal attack upon their title. They are therefore entitled to vacant possession of the land.

F **[7]** Giving the appellant's case a most generous interpretation, what he apparently seeks to do is to fasten upon the respondents' conscience a promise made by their mother. If this is an attempt to seek to attack the respondents' title by an *in personam* claim, the matters relied upon by the appellant fall far short of what is
G required for a court of equity to act. For equity to act *in personam*, it is necessary that the opposite party must be acting unconscionably. In other words, the charge of unconscionability must be directed at something the respondents had done or promised to do. That is not the appellant's case. Taking his case
H at its highest, there are simply no facts pleaded that bring the case within the *in personam* jurisdiction of a Court of Conscience. As Lord Tomlin said in *Maine and New Brunswick Electrical Power Co. v. Hart* AIR [1929] PC 185:

> I In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as. for example, the non-performance of a contract of which equity can give specific performance.

It is clear that the appellant's pleaded case does not assert the existence of a state of circumstances which attracts the equitable jurisdiction.

[8] An example of a case attracting the equitable jurisdiction is *Bannister v. Bannister* [1948] 2 All ER 133. The facts were these. The plaintiff gave the defendant an oral undertaking that the latter would be allowed to live in a cottage rent free for as long as she desired. Relying upon that undertaking the defendant agreed to sell to him that and an adjacent cottage. The plaintiff's oral undertaking was not included in the formal conveyance and was unenforceable at law by reason of s. 53(1)(b) of the Law of Property Act 1925. Later, the plaintiff brought an action to recover claiming that the defendant was a tenant at will. The defendant pleaded the oral undertaking and the plaintiff relied on the statute. It was held that the plaintiff was guilty of unconscionable conduct in seeking to rely on the absolute conveyance. In the words of Scott LJ:

> It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises **as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest**, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another. (emphasis added.)

[9] The facts relied on by the appellant in his pleaded case do not come anywhere near those of *Bannister v. Bannister*. Indeed, they fall far short of any inequitable or unconscionable conduct on the respondents' part in relying upon their indefeasible title. In these circumstances the appellant's pleading is clearly demurrable and was rightly struck out by the learned judge.

[10] For the reasons already given, this appeal is without merit and was dismissed. The usual orders consequent upon a dismissal were also made.

Zaleha Zahari JCA:

[11] The issue in this appeal is whether the High Court judge was right on the facts and in the circumstances of this case in striking out the defendant's (appellant in this appeal) defence and counterclaim; thereafter, in entering judgment in favour of the plaintiffs (respondents in this appeal).

Background

[12] The appellant and respondents are brothers. The land in issue is an undivided half (1/2) share of land held under Certificate of Title No. 347, Section 56, Bandar Kuala Lumpur, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ("the said land") together with the exclusive use and possession of the shop/flat on the ground and 1st Floor. The said land was originally purchased jointly by their father, Wong Hong, and their mother, Tang Chua Ngan (f) (since deceased) from Suet Choo Housing Development Sdn. Bhd. "the company") *vide* sale and purchase agreement dated 12 August 1970 ("the agreement") for the sum of RM55,250. The recital of the agreement states that the company had erected on the said land a four storey building ("the said building") and the company has agreed to sell to Wong Hong and Tang Chua Ngan half (1/2) share of the said land together with the exclusive use and possession of the shop/flat on the ground and 1st Floor.

[13] The respondents' case was that they were the registered owners of the said land at the material date. By letter dated 31 July 2004 they gave the appellant notice to deliver vacant possession of the said land. When the appellant failed to do so the respondents commenced proceedings for a declaratory order that the appellant was a trespasser, and also sought for an order of vacant possession of the said land as well as consequential orders.

[14] It is in evidence that the owners of each floor of the said building had executed a "common agreement" by which agreement the separate ownership of each floor was recognized. Each floor owner was responsible for their own property. Clause 8 of the common agreement states that the common agreement was binding

upon their successors-in-title. The owner of the 2nd Floor (Ng Yee Wah) and owner of the 3rd Floor (Bong Chie), had each filed an affidavit stating that they have had no dealings with the appellant, and had not authorized the appellant to enter the said land. Both of these two owners had also affirmed that they had given the respondents full authority to commence the suit against the appellant which is the subject matter of this suit under appeal.

[15] The appellant in paras. 2 and 3 of his statement of defence and counterclaim claimed to be entitled to a quarter (1/4) share of the said land. In para. 4 the appellant alleged that he had acquired a "licence coupled with equity", then in para. 5, to an "irrevocable licence". The appellant then contended that the transfer of the said land to the respondents was tainted by fraud, but did not particularize the same.

[16] On 5 January 2006 the respondents filed a summons-in-chambers to strike out the appellant's statement of defence and counter-claim pursuant to O. 18 r. 19(1) (b) and/or (d) of the Rules of High Court 1980 ("the Rules").

[17] In opposing the respondents' striking out application of his defence and counterclaim, the appellant averred that he had been in occupation of the said land together with his father since 1 April 1971 from which premises, he, together with his father, carried on business as partners under the name and style of "Hong Kee Trading" and that he was still carrying on business there under the same name. The appellant averred to having contributed towards the purchase price and that his father had promised to transfer the said land to him. The appellant also averred to having incurred costs in renovating the premises such that the business could be carried more effectively. By reason thereof the appellant contended that he had acquired an irrevocable license coupled with interest to remain in occupation of the said land. According to the appellant, the issue whether or not he holds an irrevocable license coupled with interest can only be determined at trial by way of oral testimony of witnesses.

[18] It was also the appellant's case that when his mother died on 7 July 1995 her undivided half share of the said land should have been distributed in accordance with s. 6(1)(e) of the Distribution Act 1958. His father, Wong Hong, would be entitled to one third of his mother's half share, whilst the balance two-thirds of her half share should have been divided equally between

her children, which should have included him. The appellant averred that the transfer of his father's share of the said land into the respondents' name was "done under mysterious situation" without his knowledge. Likewise, the transfer of his mother's share of the said land to the respondents name was also done without the appellant's knowledge and/or consent.

[19] At the hearing of the striking out application the appellant raised four preliminary objections. The High Court judge dismissed them all as being devoid of merit. On the contention of the respondents having no *locus standi* to commence proceedings by reason of the other co-owners of the said land not being cited as plaintiffs, the judge ruled that this issue should have been raised in the defence and not by way of an affidavit in opposition to the striking out application. The judge held that it was not open for the appellant to improve his defence by way of an affidavit. In any event she held that this was a non-issue for the following reasons: the other registered co-owners of the said land had given their consent to the respondents to commence proceedings against the appellant, and that it was unnecessary for the other co-owners to be joined as a parties as it would increase costs. In any event no cause or matter should be defeated by reason of non-joinder of any party.

[20] I agree with her rulings. This suit was filed in 2004. This issue of non-joinder of the other co-owners was only raised subsequent to the respondents filing the application to strike out. The judge was clearly right in ruling that an affidavit cannot improve the defence and counterclaim. She was also right in ruling that there is no requirement for the other co-owners to be joined as co-plaintiffs and this issue, a non-issue, as the other registered co-owners of the said land had given their consent to the respondents to commence these proceedings against the appellant. On the allegation of delay in filing the striking out application, (*ie*, fourteen months after the close of pleadings), the judge was also right in ruling this issue to be devoid of merit as an application under O. 18 r. 19(1) of the Rules could be made at any stage of the proceedings.

[21] The High Court judge also rejected the appellant's contention that the declaratary order sought by the respondents contravened s. 41 of the Specific Relief Act 1950. She ruled that there was nothing in that provision prohibiting a court from exercising its discretion of making a declaratory order so long as the declaratory order sought is for a purpose and not at the

instance of a busy body (*Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44 FC). The court's jurisdiction to make declaratory order is only subject to its own discretion. The respondents, as the registered owners of the said land, clearly has an interest in the property in issue and the High Court judge was clearly right in rejecting this preliminary objection.

[22] The judge then considered the respondents' striking out application on its merits. She ruled that the appellant's statement of defence and counterclaim did not disclose a reasonable defence, nor a reasonable cause of action. The respondents' striking out application was allowed. The respondents had applied for judgment to be entered against the appellant by prayer (iii)(a) to (e) after the defence is struck out. The judge then entered final judgment against the appellant in terms of the prayers set out in the statement of claim.

[23] The appellant's counsel had in his submission argued that an application to strike out a statement of defence and counter-claim and to enter judgment cannot be made in one and the same application as different considerations apply. He was of the view the application should have been dismissed as the application was seeking for two separate and distinct mutually exclusively reliefs. This argument is clearly misconceived. It is trite law that a court can enter judgment after striking out of efence (See *Lee Yoke San v. Tong Lee Hwan & Anor* [1977] 1 LNS 58 HC).

[24] Order 18 r. 7(1) of the Rules requires a party to state the pleadings in the form of skeletal statement of facts sufficient to identify the matters complained of to enable one to establish one's case at the trial based on what is pleaded. To satisfy the rule on pleadings, the appellant was accordingly required to plead "material facts" necessary for his defence and counterclaim. On the issue of fraud, O. 18 r. 8(1) of the Rules requires fraud to be specifically pleaded. There is good reason for doing so. It is so as not to take the other party by surprise. In MR in *Associated Leisure Ltd. & Ors v. Associated Newspapers Ltd* [1970] 2 QB, 450 Lord Denning said, 'it is the duty of the counsel not to put a plea of fraud on the record unless he has clear and sufficient evidence to support it". On the non-particularization of fraud, the Federal Court in *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 1 LNS 178, 191 ruled that " Before a plea of fraud is put on record, it is the duty of counsel to insist on being fully instructed in the matter. Such a plea should never be pleaded on flimsy material".

[25] The non-particularization of the allegation of fraud by the appellant in this case was clearly fatal. The admission by the appellant of the discovery of fraud being "recent" and "investigation is still on going" is against the Rules and not in accord with the principles which has been firmly established. Paragraphs 1 and 2 as pleaded in the statement of defence and counter-claim clearly were clearly insufficient on the issue of fraud.

[26] The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule. This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable ..." (See *Bandar Builder Sdn Bhd. & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 Supreme Court).

[27] Based on the facts and circumstances of this case the judge was right in finding that the statement of defence and counterclaim of the appellant discloses no reasonable defence, and in further finding that there is no reasonable cause of action against the respondents. This clearly is a plain and obvious case for the court to exercise its power for striking out of the defence and counterclaim, as well for judgment to be entered against the appellant. The High Court was fully justified in arriving at the conclusions which she did.

[28] The appeal is dismissed with costs. The deposit to respondents to account of taxed costs.